No. 12,553

IN THE

United States Court of Appeals

For the Ninth Circuit

ARNOLD ENRIQUEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
District of Arizona

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STATEMENT OF FACTS

As will be shown below, the appellee in its brief on pages 7 and 8, does not interpret correctly the evidence relating to the Cobos' telephone calls.

There are other mistatements of fact. For example, the appellee recites that following appellant's arrest, appellant transferred a liquor license for Pirata's Inn (page 3). The implication is that this is an admission against interest. The record, however, shows that appellant was arrested on February 15 or 16, 1949 (T.R. 129). But any liquor license

he may have had was transferred by him some three years previously to February, 1949 (T.R. 290). Additional inaccuracies will be noted by the Court in its comparison of appellee's Statement of Facts with the Transcript of Record.

ARGUMENT

I.

The Facts Are Not Sufficient to Support the Verdict

In its reply to the argument under the first Assignment of Error, the appellee does not cite a single decision to support its theory nor does it challenge the correctness of any of the cases relied upon by the appellant. The probable reason is that the government is unable to find a case in which a court has sustained a judgment based upon such frail facts as are found in the one at bar, with the possible exception of *Marino v. United States* (9th Cir. 1937), 97 F.2d 691, 113 A.L.R. 975, insofar as the appellant Gullo was concerned. But it is again submitted that *United States v. Falcone* (1940), 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, overruled the Gullo portion of the decision. The Supreme Court cited the *Marino Case* as being in conflict with cases from other jurisdictions and then adopted the views of the other jurisdictions. Obviously, this is an overrule at least by implication.

Appellee correctly states that "the evidence must be carefully considered in its entirety." Appellant agrees. And when that is done, it is apparent that the jury returned a verdict of guilty, after being out for eleven hours (T.R. 44), for the reason that the appellant had a prior record of conviction.

The appellant in his opening brief (page 20) stressed the discrepancy in the testimony of the government witness Smith. The appellee passes this off with the observation that the witness was probably "confused" (Brief, page 12). But it is a surprising situation to find a witness "confused" in regard to three events out of twenty-five, those three events being the only ones which the government contends are related to appellant; and those three events having transpired in the presence of a government employee, Cobos, who did not testify at the trial.

The court should accept the witness's testimony as he gave it; and therefore the court should conclude that the Cobos' Exhibits 19, 22 and 23 are narcotics which came from a source other than the members of the alleged conspiracy. If appellant is correct on this point, then whatever substance there is to the government's case—and it is submitted that there is none—vanishes.

In contradiction to appellee's statement in its brief (page 12), appellant believes that the record in this case bears out his statement that the Cadillac car, so often referred to, was used twice—and no more—in connection with narcotics (T.R. 99, 227). Appellee contends it was used four times. Reference is to T.R. 225. Nothing is found there which relates to any sale of narcotics. Reference is to T.R. 221. This is the same transaction referred to in the transcript at page 99. Appellee is assuming that if *two* witnesses see an individual do an unlawful act, the individual thereby commits *two* crimes.

It is also said in appellee's brief at page 12 that on six occasions the appellant was in contact with the alleged coconspirators, personally or by telephone, immediately

before or immediately after a narcotics transaction. References given by appellee to the Transcript of Record do not bear this out. Three of the six transactions involve the Cobos' telephone calls and Exhibits 19, 22, and 23 (T.R. 226-231). The testimony concerning these is not entitled to any credence; and, as the lower court pointed out: "You don't know who (he) called. (He) called a telephone number" (T.R. 254). That leaves three. One of these was an approach by a government agent to buy narcotics coupled with appellant's reply to the effect that appellant could not do anything for him (T.R. 172-174). That leaves two. One of these was when a government agent left the Pan-American Club to buy narcotics and the appellant appropriated his seat at a poker game (T.R. 151).

That leaves one. It, too, was at the Pan-American Club. The appellant was seen drinking in a group that included two of the codefendants. One of the codefendants left the group, joined the government witness, and went away with him to sell some opium (T.R. 147, 148).

The government agent testified that he spent a "great deal of time" at the Club (T.R. 147). The appellant, who owned the Club (T.R. 140), spent a great deal of time there, too (Appellees' Brief, 3). Under these circumstances, no inference can be drawn from the fact that the agent and the appellant happened to be at the same place immediately prior to the two narcotic transactions.

II.

The Lower Court Erred in Permitting the Government to Introduce Into Evidence a Record of a Prior Conviction

The government, in effect, is asking the court to abandon the rule set forth in *Smith v. United States* (9th Cir. 1949),

173 F.2d 181, and to sanction the use of records of prior convictions in all cases regardless of circumstances. Admittedly, *Orloff v. United States* (6th Cir. 1946), 153 F.2d 292, supports the government's contention. But it is submitted that that decision is contrary to the holdings in this Circuit; is contrary to the dictum in *Michelson v. United States* (1948), 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168; and is contrary to the long-established principle of safeguarding a defendant against unfair strategy to excite the passion of a jury against the accused. It is respectfully submitted that in the *Orloff Case,* the court would have been more candid and frank if it, instead of rationalizing, had merely said that this particular rule of exclusion would not be recognized in narcotics cases.

The other cases cited by the government either do not support its position or are distinguishable. In *Gowling v. United States* (6th Cir. 1933), 64 F.2d 796, the defendant had taken the stand and the court properly held that evidence of a prior conviction was admissible for purposes of impeachment. *Sargent v. United States* (9th Cir. 1929), 35 F.2d 244, involved a physician who was charged with unlawful sales of narcotics. It was properly held that evidence of numerous prior sales were admissible. The Court relied on *Casey v. United States* (9th Cir. 1927), 20 F.2d 752; *Williams v. United States* (5th Cir. 1923), 294 F. 682; and *Thompson v. United States* (8th Cir. 1919), 258 F. 196. All these cases hold that previous, related sales are admissible to show absence of mistake, scheme, and guilty knowledge. To illustrate: D, a doctor, is charged with unlawfully selling narcotics to W on January 15, 1950. It may well be that he intended to dispense a harmless drug but

by accident gave W morphine tablets. Such would be a good defense. To overcome it, the government would be entitled to show that every day from January, 1949 D dispensed morphine to A, B, C and E under the same circumstances that he dispensed it to W. Each transaction would go to negative the idea that the transaction of January 15, 1950 was actually a mistake. The case falls within the same class of Exception found in *Kettenbach v. United States* (9th Cir. 1913), 202 F. 377. Where one is charged with making a false bookkeeping entry, the prosecution is permitted to show other false entries for the purpose of establishing design and to eliminate the rationale of mistake. The same is true of *Hatem v. United States* (4th Cir. 1930), 42 F.2d 40.

The government also relies on *United States v. Bollenbach* (2nd Cir. 1945), 147 F.2d 199 and *Marino v. United States* (9th Cir. 1937), 91 F.2d 691. In the latter case, it is not clear just what the court did hold in regard to the proposition of law considered herein. In the former case, the court failed to state what the evidence of the prior wrongdoing consisted of or the circumstances surrounding such wrongdoing; consequently, the case is not helpful.

Van Gesner v. United States (9th Cir. 1907), 153 F. 46 and its companion case, *Williamson v. United States* (1908), 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278, are not in point. There, the defendants, fearful that a rival organization was acquiring leases to private lands for sheepgrazing purposes, unlawfully induced numerous "dummies" to file applications for entries on Federal lands under the Timber and Stone Act. Had the entries been allowed, the rival organization would have been deprived of grazing privi-

leges, water-holes, and the like. The government in its prosecution for conspiring to suborn perjury was properly allowed to expose the whole plot, even though in doing so evidence of other wrongdoing to promote the scheme was injected.

The only other cases of any interest cited by the appellee are *Mackreth v. United States* (5th Cir. 1939), 103 F.2d 495, wherein the court held that evidence of crimes for which the defendant was not indicted was inadmissible; and *Boyd v. United States* (1892), 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077. In the *Boyd Case,* the facts show that while perpetrating a robbery, the defendants committed murder and were indicted and tried. Evidence of five previous robberies were admitted in evidence. Two were admissible to establish the identity of the defendants. The evidence of the other three contributed nothing toward the proof of the murder except the defendants' propensity to commit robbery. The Supreme Court reversed the judgment of guilty because of the erroneously admitted evidence, saying:

> "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

III.

The Lower Court Erred in Admitting Hearsay Evidence

The appellee, in attempting to sustain the telephone conversations mentioned in T.R. 226, 228, and 230, cites several cases.

The first case cited is *Blakeslee v. United States* (1st Cir. 1929), 32 F.2d 15. This case is of no value on the point raised by the appellant as here the Court admitted numerous telephone calls between two conspirators without showing any of the conversation itself. This was rightfully permitted to show communication between two conspirators without an attempt to show what the communication itself was. The Court said:

> "We think it was competent, even if a remote fact, to show means of long-distance communication among the alleged conspirators. For this purpose the strict identity of persons speaking over the telephone was not necessary."

The next case quoted by the appellee is *Wood v. United States* (5th Cir. 1936), 84 F.2d 749, a case in the same category wherein the Court admitted evidence of numerous telephone conversations without the actual conversations themselves; and the Court held it was admissible for the purpose of showing communication between two coconspirators without the actual conversation.

The admissibility of the evidence of Mr. Smith watching Cobos dial a telephone number and then proving the telephone number was the telephone number of this appellant is not questioned. Appellant's objection is based on the conversation that Smith relates that Cobos stated in his presence. Cobos was not a witness at the trial and yet the

Court permitted Smith to testify that he heard Cobos mention the name "Pirata" many times and once heard Cobos say, "Let me talk to Pirata." The inference was left with the jury that he was talking to "Pirata"; and yet during the argument for the judgment of acquittal, the Court itself stated, "Well, you don't know who they called. They called a telephone number" (T.R. 254).

The United States District Attorney attempted to introduce evidence of Cobos' conversation and then stated "We don't know whether Cobos will be here or not, so we can't use it." (T.R. 122). Being fully cognizant of the fact that such testimony was inadmissible, the United States District Attorney stopped his own witness from testifying concerning the telephone conversation and transactions with Cobos.

Could it be, however, that realizing the full weakness and lack of evidence in the case against the appellant, that the United States District Attorney, before closing his case, proceeded to use the same evidence that he had heretofore voluntarily said was inadmissible? If such evidence was inadmissible at the beginning of the Government's case, it was certainly inadmissible throughout the entire case.

Without the presence of Cobos at the trial, every word Cobos said cannot be construed as anything except hearsay evidence. Mr. Smith, the witness, was testifying as to something that an absent person said not in the presence of the appellant. The appellant did not have the right or the ability to cross-examine Cobos as to what was said besides the word "Pirata" or to cross-examine Cobos to determine whether or not he actually talked to Pirata. Such testimony on the part of Smith was highly prejudicial to this appellant and being hearsay evidence constitutes reversible error.

CONCLUSION

Again, it is respectfully urged that this court should reverse the judgment of the lower court.

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